Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-912

BOARD OF TRUSTEES OF THE PENSION TRUST FUND FOR OPERATING ENGINEERS,
Petitioner,

vs.

BENJAMIN R. BURROUGHS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Board of Trustees of the Pension Trust Fund for Operating Engineers respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in the above-entitled proceeding on October 4, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 542 F.2d 1128 and appears in Appendix A to the petition of Benjamin R. Burroughs dated December 23, 1976, previously filed with this Court, at pp. i-viii. The findings of fact and conclusions of law of the United States District Court for the Northern District of California are reported at 398 F. Supp. 168, and appear in Appendix B to the petition of Benjamin R. Burroughs at pp. ix-xxxvi.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Section 302(e) of the Labor-Management Relations Act, 29 U.S.C. § 186(e), confer jurisdiction upon United States District Courts to grant pensions to applicants contrary to the terms of a pension plan negotiated for the sole and exclusive benefit of employees of employers, their families and dependents, pursuant to collective bargaining procedures mandated by the National Labor Relations Act?

2. Did the petitioner Board of Trustees act arbitrarily or capriciously in applying the break-in-employment rule of the pension plan to respondent

for the years 1958, 1959 and 1960 notwithstanding the fact that participants in the plan, including respondent, did not receive notice of the rule until April, 1960?

3. Did enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., commonly known as ERISA, remove any question as to the validity of the application of the break-in-employment rule to respondent by:

(a) expressly validating application of the rule as negotiated by the collective bargaining parties for any period prior to the date upon which the break-in-service rule of ERISA became applicable to the pension plan; and

(b) adopting a break-in-service rule for periods thereafter which, if applied to respondent, would have barred him from a pension?

STATUTES INVOLVED

Section 302 (c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186 (c)(5), is set forth in Appendix C to the petition of Benjamin R. Burroughs, at pp. xxvii-xxx. Section 302(e) of that Act, 29 U.S.C. § 186(e), is set forth in Appendix A to this cross-petition, *infra* at p. i.

The provisions of Sections 202, 203, 404 and 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., are set forth in Appendix A to this cross-petition, *infra* pp. ii-xxii.

STATEMENT OF THE CASE

We adopt the statement of the case at pp. 2-7 of Burroughs' petition. We add the following:

The break-in-employment rule applied to respondent did not originate with the petitioner Board of Trustees but was an integral provision of the Pension Plan negotiated by the Union and Contractor Association that established the Pension Fund and Plan (C.R. 110-111).

The terms of the Plan were negotiated initially upon the basis of an actuarial estimate that the average operating engineer covered by the Plan "would achieve 1700 hours of work annually" (Def. Exh. 208, p. 3). Experience in the operation of the Plan over the first 15 years, however, showed that operating engineers covered by the Plan averaged approximately 1500 hours of contributory employment annually (Pl. Exh. 130; Defs. Exhs. 205 to 207). In contrast, respondent's contributory employment over the 15 year period averaged less than 230 hours annually and the total amount of employer contributions with respect to his work up to the date of his retirement and application for a pension was $963.02.

An analysis of respondent's work record and the hourly rates in effect for employer contributions when the work was performed shows the following (Pl. Exh. 6; Def. Exh. 207, p. 31):

Year	Hours Worked	Contribution Rate Per Hour	Contribution Received
1958	16	$ .05	$ .80
1959	8	.10	.80
1960	68	.10	6.80
1961	224	.10	22.40
1962	871	.10	87.10
1963	721	.15	108.15
1964	86	.15	12.90
1965	439	.20	87.50
1966	0	.25	0.00
1967	95	.35	33.25
1968	4	.40	1.60
1969	19	.50	9.50
1970	165	.625	103.12
1971	466	.675	314.55
1972	259	.75	194.25
TOTALS	3,441		$963.02

REASONS FOR GRANTING THE WRIT

1. The facts and legal issues involved in Burroughs' case present to this Court an opportunity to settle and apply reasonable, just and realistic guidelines for the judicial review of the actions and decisions of collective bargaining parties who establish employee benefit plans and the trustees who administer them. The prompt settlement of such guidelines is vital to the orderly administration of justice in the courts, and particularly in the federal courts.

Subsections 502 (a)(1)(B), (e)(1) and (g) of ERISA, 29 U.S.C. § 1132 (a)(1)(B), (e)(1) and (g), provide, in pertinent part, as follows:

"(a) A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due him under the terms of the [employee benefit] plan, or to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

* * *

(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

There are literally millions of participants and beneficiaries of employee benefit plans and the potential volume of actions pursuant to Section 502—the purpose of which may be merely to "clarify" future rights and in which the participant or beneficiary may be awarded an attorney's fee regardless of the outcome of the action—is staggering. In the words of the Court of Appeals in *Alvares v. Erickson* (9th C.A. 1975) 514 F.2d 156, at pp. 160-161:

"That Act [ERISA] imposes very broad jurisdiction upon the federal courts in cases involving

> welfare trusts such as those involved here, § 502, and broadly supersedes, effective January 1, 1975, otherwise applicable state laws, § 514. If we are firing a cannon, **the Congress has blown up a dam.**"[1]

If the resulting flood is to be kept within reasonable bounds and if protective safeguards built into ERISA are to be given effect, this Court must promptly reaffirm the settled principle which protects agreements reached through collective bargaining from governmental interference and identify and apply the provisions of ERISA which give effect to that principle. Burroughs' case provides the opportunity for so doing for the following reasons:

(a) The break-in-employment rule which the courts below held was arbitrarily and capriciously applied to Burroughs was not imposed by the petitioner Board of Trustees but was the product of collective bargaining between the parties who established the Pension Fund and Plan. The only action taken by the Board was the application of the Rule to Burroughs—an action which, after January 1, 1975, was expressly mandated by Section 404(a)(1)(D) of ERISA as a fiduciary duty (Appendix A, pp. xiv-xv). In invalidating such action the courts below violated a fundamental principle of federal labor policy, namely, that parties to a collective bargaining relationship should be and are free to work out con-

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[1]Throughout this petition, emphasis is added unless otherwise noted.

tractual solutions to problems which are not contrary to express limitations imposed by federal statute.

See:

H. K. Porter Company v. National Labor Relations Board (1970) 397 U.S. 99, 108, 90 S.Ct. 821, 826;

National Labor Relations Board v. Burns International Security Services, Inc. (1972) 406 U.S. 272, 287, 92 S.Ct. 1571, 1582;

Local 24, International Teamsters etc. v. Oliver (1959) 338 U.S. 283, 295-296, 79 S.Ct. 297, 304.

In *White Motor Corp. v. Malone* (8th C.A. 1976) ..... F.2d ..... 79 L.C. ¶ 11,764, p. 22, 109, the Court of Appeals for the Eighth Circuit applied the principle of the cited cases, and related holdings of this Court, to a collectively bargained pension plan, saying (pp. 22, 112-22, 115):

> "The Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan, **obligations arrived at freely through collective bargaining,** and appears in its operation to be a unique legislative act. The Supreme Court's holdings and decisions in the area of federal labor law preemption require reversal."
>
> * * * *
>
> "*Machinists*, in its review of pertinent Supreme Court cases, makes it abundantly clear that *neither the states nor the National Labor Relations Board may attempt to influence the substantive terms of collective bargaining agreements*

by regulating the conduct of the parties to collective bargaining negotiations. These agreements are to be controlled by and left to the free play of economic forces. If states cannot control the economic weapons of the parties at the bargaining table, *a fortiori,* they may not directly control the substantive terms of the contract which results from that bargaining.

* * * *

Moreover, in *Labor Board v. Insurance Agents,* the Court cited *Oliver* in support of the following statement:

> *But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.* See *Teamsters Union v. Oliver, supra* at 295. [*Insurance Agents, supra,* 361 U.S. at 488.]

The Supreme Court in *Machinists* also relied on specific language in *Oliver* as a basis for overruling *Briggs-Stratton.*

> Our decisions since Briggs-Stratton have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: '[S]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.' *Local 24 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.-*

> *C.I.O. v. Oliver*, 358 U.S. 283, 296 * * * (1959). [*Machinists, supra*, ... U.S. at ....., 96 S.Ct. at 2559.]
>
> Thus, *Oliver* stands for the general proposition that a state cannot modify or change an otherwise valid and effective provision of a collective bargaining agreement."

The action of the collective bargaining parties in making the break-in-employment rule retroactive to January 1, 1958, the date when employer contributions to the Pension Fund commenced, was justified by the importance of cutting down, as rapidly as possible, the past service liability of the Fund. This liability had to be amortized out of contributions received subsequent to January 1, 1958, with respect to the work of actively employed operating engineers, and in fairness to such employees, it was important to keep such liability to a minimum.

See:

Gaydosh v. Lewis (App. D.C. 1969) 410 F.2d 262, 265;

Assalone v. Carey (App. D.C. 1972) 473 F.2d 199, 203;

Agosti v. Huge (D.C. 1974) 378 F. Supp. 1322, 1323, *aff'd*, (App. D.C. 1975) 521 F.2d 324;

Roark v. Lewis (App. D.C. 1968) 401 F.2d 425, 427-428;

Roark v. Boyle (App. D.C. 1970) 439 F.2d 497, 507-508;

Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950 (App. D.C. 1975) 517 F.2d 1275, 1283-1287.

(b) Subsection 203 (b)(1) (F) of ERISA provides that for vesting purposes an employee pension benefit plan may disregard "years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date" (Appendix A, p. xi). The effect of this provision was to validate by express legislation the break-in-service rules of existing plans and in the case of collectively bargained plans subject to Section 302(c)(5) of the Labor-Management Relations Act, to give congressional approval to the principle that prior to the enactment of ERISA vesting standards were governed by the agreement of the collective bargaining parties. The provision imparts certainly to important terms of employee pension benefit plans and gives needed guidance to the trustees of such plans. The provision was ignored by the courts below, but if given its intended effect by this Court in Burroughs' case, it will protect against much unnecessary litigation under Section 502 of ERISA.

(c) The courts below rested their jurisdiction and authority to invalidate the break-in-employment rule as applied to Burroughs upon Section 302(c) of the Labor-Management Relations Act. Section 203 of ERISA makes clear, however, that a break-in-employment or break-in-service rule is a standard for the preservation of vested benefits and the history of federal labor legislation since 1947 makes equally clear that Section 302(c)(5) of the Labor-Management Relations Act was not intended to establish or provide such a standard.

During the years subsequent to 1947, Congress was engaged in an almost continuous study of private pension and welfare plans (U.S. Code Cong. and Adm. News, 1958, pp. 4138-4139). These studies and investigations resulted in the enactment of the Welfare and Pension Plans Disclosure Act of 1958 (29 U.S.C. § 301 *et seq.*), which "was not intended to transfer to the federal courts general jurisdiction over the administration of such [welfare and pension] plans and adjudication of amounts due various beneficiaries" (*Lieberman v. Cook,* (W.D. Pa. 1972) 343 F. Supp. 558, 561-562; see U.S. Code Cong. and Adm. News, 1958, p. 4153; *Moyer v. Kirkpatrick* (E.D. Pa. 1967) 265 F. Supp. 348, *aff'd* (3d C.A. 1968) 387 F. 2d 955). The studies continued and in 1962 Congress enacted amendments to the Disclosure Act (U.S. Code Cong. and Adm. News, 1962, pp. 43, 1532) which strengthened the Act in many respects, but did not change the scope and purpose of the Act from disclosure to regulation.

In *White Motor Corp. v. Malone, supra,* the Court of Appeals for the Eighth Circuit said the following concerning such scope and purpose (pp. 22, 115-22, 117):

> "Finally, we turn to the district court determination that the federal Welfare and Pension [sic] Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) (codified at 29 U.S.C. § 301 *et seq.*) (Disclosure Act), expressly authorizes substantive state regulation of pension plans. The statutory language relied on by the district court is as follows:

'The provisions of this chapter * * * shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employer, welfare, or pension benefit plans, or in any manner to authorize the operation or administration of such plan contrary to any such law. [29 U.S.C. § 309(b).]'

Neither this language nor statutory history suggests that Congress intended to regulate substantive provisions, performance of, or the funding of any employee benefit plan or to authorize such regulation by the states."

* * * *

Accordingly, no warrant exists for construing this legislation to leave to a state the power to change substantive terms of pension plan agreements.

The construction to the contrary pressed upon us by the appellee would turn upside down well-established labor law principles.

'An appreciation of the true character of national labor policy expressed in the N.L.R.A. and L.M.R.A. indicates that in providing a legal framework for union organization, **collective bargaining,** and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and **laissez faire** in respect to union organization, **collective bargaining,** and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.' [Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1352 (1972).]"

After a further and more intensive study of the law governing private pension plans which began in June, 1970 (Interim Report No. 92-634 of the 92d Congress 2d Session, p. 2), both the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare concluded in 1974 (U.S. Code Cong. and Adm. News, 1974, pp. 4642, 4841) that:

> "The Labor Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. **The Act is not intended to establish nor does it provide standards for the preservation of vested benefits,** funding adequacy, security of investment, or fiduciary conduct."

The legislative history of Section 302 is silent with regard to vesting standards for the pension plans authorized by the Section (see *Arroyo v. United States* (1959) 359 U.S. 419, 424-427, 79 S.Ct. 864, 867-869). That silence, combined with the continuing study by Congress of vesting standards and other matters having to do with the detailed regulation of such plans, culminating in the enactment of ERISA, is persuasive evidence of the correctness of the Congressional Committees' conclusion, quoted above, that minimum vesting standards were not established by that Section (*National Woodwork Mfrs. Ass'n v. N.L.R.B.* (1967) 386 U.S. 612, 640, 87 S.Ct. 1250, 1266). Since pensions for employees are "mandatory subjects of collective bargaining" (*Inland Steel Company v. N.L.R.B.* (7th C.A. 1948) 170 F. 2d 247, *cert. den.*

(1949) 336 U.S. 960; U.S. Code Cong. and Adm. News, 1974, p. 4640), the result of this conclusion is that the establishment of such standard for a plan authorized by Section 302 was left to the processes of collective bargaining, unfettered by governmental compulsion or limitations (see *National Woodwork Mfrs. Ass'n. v. N.L.R.B., supra,* 386 U.S. at pp. 642-643, 87 S.Ct. at p. 1267).

ERISA has removed any justification or reason for stretching the terms of Section 302(c)(5) to serve purposes which were never intended by Congress. In order to avoid confusion, uncertainty and interminable litigation this Court should settle unequivocably the limited scope and operation of that statute.

(d) In *Roark v. Lewis* (App. D.C. 1968) 401 F.2d 425, the Court of Appeals for the District of Columbia announced a rule of judicial abstention in the review of the actions and decisions of the trustees of employee benefit plans, in the following terms (p. 429):

> "Basically it is the responsibility of the parties and Congress to determine the appropriateness of the pension plans with the court's participation limited to affirmative action **only in those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law.**"

This rule has received general acceptance by other Courts of Appeals and merits favorable consideration by this Court. If applied to Burroughs' case, the rule would require reversal of the judgment below.

Burroughs was a marginal worker. He is claiming accrued pension benefits in excess of $7800, and future benefits of $155 per month, on the basis of employer contributions with respect to his work as an operating engineer of less than $1000. The difference between the benefits he claims and the contributions received by the Fund as a result of his work must come from contributions, and returns on contributions, made with respect to the work of other operating engineers. The break-in-employment rule, as applied by the petitioner Board, was designed to relieve these operating engineers of this disproportionate burden of past service liability and in the light of this purpose, was not "so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law."

2. For the reasons given in paragraph 1, the judgment and opinion of the Court of Appeals is in conflict with applicable decisions of this Court and with the decision of the Court of Appeals for the Eighth Circuit in *White Motor Corp v. Malone, supra.*

3. If this Court grants the petition of Burroughs for a writ to review the judgment and opinion of the Court of Appeals as to his claim to an award of an attorney's fee, justice requires that it also review the judgment and opinion as to the merits of his claim to a pension. If Burroughs should not have prevailed on his claim to a pension, he is clearly not entitled to an award of an attorney's fee, even if Section 302 of the Labor-Management Relations Act authorizes such an award to a prevailing litigant in a

proper case. This would be particularly true if this Court were to determine that Section 302(e) did not grant the District Court jurisdiction to entertain any of his claims.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the petition of the Board of Trustees for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit upholding the judicial award of a pension to respondent Burroughs contrary to the terms of the pension plan.

Respectfully submitted,

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December 30, 1976.

(Appendix A Follows)

APPENDIX

Appendix A

LABOR MANAGEMENT RELATIONS ACT OF 1947, SECTION 302(e)

(29 U.S.C. §186(e))

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

* * *

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

PENSION REFORM ACT OF 1974
P.L. 93-406
(29 U.S.C. §1001 et seq.)

* * *

Act Sec. 1. This Act may be cited as the "Employee Retirement Income Security Act of 1974."

* * *

Minimum Participation Standards

Act Sec. 202. (a)(1)(A) No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates—

(i) the date on which the employee attains the age of 25; or

(ii) the date on which he completes 1 year of service.

(B)(i) In the case of any plan which provides that after not more than 3 years of service each participant has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting "3 years of service" for "1 year of service".

(ii) In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) of the Internal Revenue Code of 1954) by an employer which is exempt from tax under section 501(a) of such Code, which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is

nonforfeitable at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituing "30" for "25". This clause shall not apply to any plan to which clause (i) applies.

(2) No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age, unless—

(A) the plan is a—

(i) defined benefit plan, or

(ii) target benefit plan (as defined under regulations prescribed by the Secretary of the Treasury), and

(B) such employees begin employment with the employer after they have attained a specified age which is not more than 5 years before the normal retirement age under the plan.

(3)(A) For purposes of this section, the term "year of service" means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee's employment commenced, except that, in accordance with regulations prescribed by the Secretary, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(B) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period

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as may be determined under regulations prescribed by the Secretary.

(C) For purposes of this section, the term "hour of service" means a time of service determined under regulations prescribed by the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(4) A plan shall be treated as not meeting the requirements of paragraph (1) unless it provides that any employee who has satisfied the minimum age and service requirements specified in such paragraph, and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of—

(A) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or

(B) the date 6 months after the date on which he satisfied such requirements, unless such employee was separated from the service before the date referred to in subparagraph (A) or (B), whichever is applicable.

Act Sec. 202. (b)(1) Except as otherwise provided in paragraphs (2), (3), and (4), all years of service with the employer or employers maintaining the plan shall be taken into account in computing the period of service for purposes of subsection (a) (1).

(2) In the case of any employee who has any 1-year break in service (as defined in section 203

(b)(3)(A)) under the plan to which the service requirements of clause (i) of subsection (a)(1)(B) apply, if such employee has not satisfied such requirements, service before such break shall not be required to be taken into account.

(3) In computing an employee's period of service for purposes of subsection (a)(1) in the case of any participant who has any 1-year break in service (as defined in section 203(b)(3)(A)), service before such break shall not be required to be taken into account under the plan until he has completed a year of service (as defined in subsection (a)(3)) after his return.

(4) In the case of an employee who does not have any nonforfeitable right to an accrued benefit derived from employer contributions, years of service with the employer or employers maintaining the plan before a break in service shall not be required to be taken into account in computing the period of service for purposes of subsection (a)(1) if the number of consecutive 1-year breaks in service equals or exceeds the aggregate number of such years of service before such break. Such aggregate number of years of service before such break shall be deemed not to include any years of service not required to be taken into account under this paragraph by reason of any prior break in service.

Minimum Vesting Standards

Act Sec. 203. (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the

requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 205).

(B) A right to an accrued benefit derived from employer contributions shall not be treated

as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 302(c)(8).

(D) (i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 204(c)(2)(C) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 204(c)(2)(C) (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before the date of the enactment of this Act, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before the date of the enactment of this Act if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after the date of the enactment of this Act. The Secretary of the Treasury shall prescribe such

regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) CROSS REFERENCE.—

For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 206(c).

Act Sec. 203. (b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2), all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 22, except that in the case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2), the plan may not disregard any such year of service during which the employee was a participant;

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions;

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970; and

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date.

(2) (A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 202(a)(3)(C).

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term "1-year break in service" means a calendar

year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 204(b)(1)(F) who has any 1-year break in service, years of service after such break shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such break.

(D) For purposes of paragraph (1), in the case of a participant who, under the plan, does not have any nonforfeitable right to an accrued benefit derived from employer contributions, years of service before any 1-year break in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service equals or exceeds the aggregate number of such years of service prior to such break. Such aggregate number of years of service before such break shall be deemed not to include any years of service not required to be taken into account under this subparagraph by reason of any prior break in service.

(4) Cross references.—

(A) For definitions of "accrued benefit" and "normal retirement age", see sections 3 (23) and (24).

(B) For effect of certain cash out distributions, see section 204(d)(1).

Act Sec. 203. (c)(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimina-

tion prohibited by section 401(a)(4) of the Internal Revenue Code of 1954.

(3) The requirements of subsection (a)(2) shall be deemed to be satisfied in the case of a class year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on his behalf with respect to any plan year are nonforfeitable not later than the end of the 5th plan year following the plan year for which such contributions were made. For purposes of this part, the term "class year plan" means a profit sharing, stock bonus, or money purchase plan which provides for the separate nonforfeitability of employees' rights to or derived from the contributions for each plan year.

Act Sec. 203. (d) A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

* * *

Fiduciary Duties

Act Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing

that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407 (d)(4) and (5)).

Act Sec. 404. (b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

Act Sec. 404. (c)In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

* * *

Civil Enforcement

Act Sec. 502. (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title,

or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

Act Sec. 502. (b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

Act Sec. 502. (c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing

the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Act Sec. 502. (d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

Act Sec. 502. (e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary.

State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Act Sec. 502. (f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Act Sec. 502. (g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Act Sec. 502. (h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action

under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

Act Sec. 502. (i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975 (f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975 (e)(1) of such Code.

Act Sec. 502. (j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

Act Sec. 502. (k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action con-

trary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

* * *

Effect on Other Laws

Act Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

Act Sec. 514. (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for

purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a state.

Act Sec. 514. (c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

Act Sec. 514. (d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.